Pheh Boon Kheang v Peh Boon Wang

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–396 OF 2002
ABDUL MALIK ISHAK J
24 DECEMBER 2006

Civil Procedure — Discovery — Application for production of documents — Production of original official receipts for examination by the chemistry department — Purpose of examining and analysing the said receipts — Whether defendant required further evidence

The plaintiff and the defendant were brothers and were registered as joint proprietors in equal shares in the undivided land together with a two storey shophouse building. Sometime in May 1978 or thereabouts, the defendant physically occupied the said property and ran his sundry shop business on the ground floor and the defendant occupied the first floor of the said property to the exclusion of the plaintiff. The plaintiff averred that the defendant occupied one half of the said property as a trespasser. The defendant contended that the plaintiff held his part of the said property on an express trust for the defendant and that the plaintiff's claim was wrongful. The defendant had filed an application in encl 48 pursuant to O 24 r 11 of the Rules of the High Court 1980 ('RHC') and pursuant to the court's inherent jurisdiction for the plaintiff to produce to the defendant's solicitors the original official receipts of the developer by the name of Lin Seng Rice Mill Company Limited for examination by the chemistry department, Malaysia. By that application in encl 48, the defendant sought an expert from the chemistry department Malaysia to be appointed to examine and analyse the said receipts. The learned senior assistant registrar dismissed the defendant's application in encl 48 with costs and the defendant filed this appeal to the judge in chambers in encl 49.

Held, dismissing defendant's appeal in encl 49 with costs:

(1) The defendant's application in encl 48 was vague. The defendant did not know what he wanted and what he wanted the government chemist to do. The defendant merely averred that he wanted the government chemist to be appointed 'to examine and analyse the said receipts'. What was the purpose of examining and analysing the said receipts by the government chemist? The defendant averred that the plaintiff held the said property on an express trust for the defendant. Unfortunately, there was documentary evidence to the contrary. Both the parties were the registered proprietors of the said property and they both held the same in equal shares since 19 September 1968. The principle of indefeasibility came into play for the benefit of both the parties (see para 14).

(2) The receipts were not related to any matter in question in this action.

The defendant too had also failed and/or neglected to state the relevance of the said receipts in this action. Except that the defendant had asserted baselessly that 'the plaintiff's claim was a false claim and he had falsified some documents in connection therewith' in para 9 of his amended statement of defence, the defendant had failed to substantiate his allegation or stated the reasons as to why the receipts were perceived by him to be falsified. An irresistible inference could be drawn that the defendant in filing the application in encl 48 was on a fishing expedition to fish for further evidence. Enclosure 48 was unhappily worded and this court should not accede to it (see paras 16, 30).

[Bahasa Malaysia summary

Plaintif dan defendan adalah adik beradik dan didaftarkan sebagai tuan punya bersama dalam bahagian yang sama ke atas tanah dengan bangunan kedai dua tingkat yang belum dibahagikan. Lebih kurang pada Mei 1978, defendan telah mendiami hartanah tersebut dan menjalankan perniagaan kedai pelbagai di tingkat bawah dan defendan juga mendiami tingkat satu hartanah tersebut yang mengecualikan plaintif. Plaintif menyatakan bahawa defendan menduduki satu setengah bahagian hartanah tersebut sebagai penceroboh. Defendan menyatakan bahawa plaintif memegang bahagian hartanahnya atas satu amanah yang nyata untuk defendan dan tuntutan plaintif adalah salah. Defendan telah memfailkan permohonan di lampiran 48 mengikut A 24 k 11 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan mengikut bidang kuasa mahkamah yang sedia ada untuk plaintif mengemukakan kepada peguamcara defendan resit-resit rasmi asal pemaju yang dikenali sebagai Lin Seng Rice Mill Company Limited untuk pemeriksaan jabatan kimia, Malaysia. Melalui permohonan di lampiran 48, defendan memohon seorang pakar daripada jabatan kimia Malaysia dilantik untuk memeriksa dan menganalisakan resit-resit tersebut. Penolong kanan pendaftar yang bijaksana menolak permohonan defendan di lampiran 48 dengan kos dan defendan kini memfailkan rayuan kepada hakim dalam kamar di lampiran 49.

Diputuskan, menolak rayuan defendan dalam lampiran 49 dengan kos:

(1) Permohonan defendan di lampiran 48 adalah tidak jelas. Defendan tidak tahu apa yang dikehendakinya dan apa yang beliau hendaki daripada ahli kimia kerajaan. Defendan hanya menyatakan bahawa beliau menghendaki ahli kimia kerajaan dilantik untuk 'memeriksa dan menganalisakan resit-resit tersebut'. Apakah tujuan pemeriksaan dan penganalisa resit-resit tersebut oleh ahli kimia kerajaan? Defendan menyatakan bahawa plaintif memegang hartanah tersebut atas satu amanah yang nyata untuknya. Malangnya, terdapat bukti dokumentari yang menyatakan sebaliknya. Kedua-dua pihak adalah pemilik berdaftar hartanah tersebut dan mereka memegangnya sama rata semenjak 19 September 1968. Prinsip indefisibiliti memainkan peranan di sini untuk manfaat kedua-dua pihak (lihat perenggan 14).

(2) Resit-resit tersebut tidak berkaitan dengan sebarang perkara yang disoal di dalam tindakan ini. Defendan juga telah gagal dan/atau cuai menyatakan perkaitan resit-resit tersebut dalam tindakan ini. Kecuali di mana defendan

menyatakan tanpa asas bahawa 'tuntutan plaintif adalah tuntutan palsu dan beliau telah memalsukan beberapa dokumen berkaitan di sini' di perenggan 9 pernyataan pembelaan, defendan telah gagal menyokong pernyataannya ataupun menyatakan sebab mengapa pada pandangannya resit-resit tersebut dipalsukan. Satu inferens yang tidak dapat dibendung dapat disimpulkan di sini bahawa defendan dalam memfailkan permohonan di lampiran 48 menjalankan satu ekspedisi memancing bagi mencungkil keterangan tambahan. Lampiran 48 tidak dinyatakan dengan jelas dan mahkamah tidak akan bersetuju terhadapnya (lihat perenggan 16, 30).]

Notes

For cases on application for production of documents, see 2 *Mallal's Digest* (Consolidated Subject Index) paras 2177–2187.

Cases referred to

Amar Nath, Convict, Petitioner v State, Respondent (1971) Cri LJ 1335 (Del) (refd)
Buckley v Rice-Thomas (1554) 1 Plowd 118 (refd)
Cook v Fountain (1676) 3 Swantst 585 (refd)
Davie v Edinburgh Magistrates [1953] SC 34 (refd)
Folkes v Chadd (1782) 3 Dough KB 157 (refd)
Frazer v Walker [1967] 1 AC 569 (refd)
Green v Russell [1959] 2 QB 226 (refd)
Gumbley v Cunningham [1989] 1 All ER 5 (refd)
H v Schering Chemicals Ltd [1983] 1 All ER 849 (refd)
Haidar Ali Pradhania (1912) 17 CWN 354, 14 Cri LJ 129 (refd)
Harmony Shipping Co SA v Saudi Europe Line Ltd [1979] 1 WLR 1380 (refd)
Hinds v London Transport Executive [1979] RTR 103 (refd)
Jasiewicz v Jasiewicz [1962] 1 WLR 1426 (refd)
Lord Hammer v Flight (1876) 24 WR (refd)
Lord Strathcona SS Co v Dominion Coal Co Ltd [1926] AC 108 (refd)
Middlesex County Council v Nathan (1937) 2 KB 272 (refd)
Philipps v Philipps [1878] 4 QBD 133 (refd)
PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (refd)
R v Anderson [1972] 1 QB 304 (refd)
R v Clarke [1995] 2 Cr App R 425 (refd)
R v Gordon [1995] 1 Cr App R 290 (refd)
R v Harden [1963] 1 QB 8 (refd)
R v Hobson [1998] 1 Cr App R 31 (refd)
R v Murphy [1980] QB 434 (refd)
R v Oakley (1979) 70 Cr App R 7 (refd)
R v Robb (1991) 93 Cr App R 161 (refd)
R v Silverlock [1874] 2 QB 766 (refd)
R v Smith [1979] 1 WLR 1445 (refd)
R v Somers [1963] 1 WLR 1306 (refd)
R v Stockwell (1993) 97 Cr App R 260 (refd)
R v Strudwick (1993) 99 Cr App R 326 (refd)
R v Toner (1991) 93 Cr App R 382 (refd)
R v Wellington [1991] Crim LR 543 (refd)
Reg v John Smith (1858) 8 Cox 32 (refd)

Vandervell's Trusts (No 2), Re, White v Vandervell Trustees Ltd [1974] 3 WLR 257; [1974] 3 All ER 205 (refd)
Wilson v Lord Bury [1880] 5 QBD 518 (refd)
Yong Wee Ming v Chin Thian Guan [1984] 1 MLJ 236 (refd)

Legislation referred to
Evidence Act 1950 ss 45, 46, 47, 48, 49, 50, 51
Rules of the High Court 1980 O 24 r 11

Joginder Singh (Joginder Singh & Co) for the plaintiff.
Adrian Hii Muo Teck (Wee Chian Sian with him) (Shook Lin & Bok) for the defendant.

Abdul Malik Ishak J:

FACTS OF THE CASE

[1] The plaintiff and the defendant are brothers. They are registered as joint proprietors in equal shares in the undivided land held under Grant No 14282, Lot No 7307, District and Mukim of Kuala Lumpur together with a two storey shophouse building thereon bearing postal address No 26, Jalan 22/49, 46300 Petaling Jaya, Selangor ('the said property'). The plaintiff is the elder brother while the defendant is the younger brother. The approximate value of the property is said to be in the region of RM600,000. Indefeasibility is the hallmark of the Torrens system. Raja Azlan Shah CJ Malaya (as His Majesty then was) aptly said in *PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136, that 'the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it.' As registered proprietors of the said property, both the plaintiff and the defendant are the joint owners and they are immune from adverse claims other than those specifically excepted (*Frazer v Walker* [1967] 1 AC 569).

[2] Sometime in May 1978 or thereabouts, the defendant physically occupied the said property. The defendant runs his sundry shop business on the ground floor and the defendant also occupies the first floor of the said property to the exclusion of the plaintiff. The plaintiff has, so it seems, on a number of occasions approached the defendant in order to obtain vacant possession of one half of the said property. But all these to no avail. The plaintiff avers that the defendant occupies one half of the said property as a trespasser. The plaintiff now files this suit and seeks the following reliefs:

(i) An account be made for all sums paid by the defendant in respect of quit rent, assessment and insurance from 12 February 1989 to date of judgment in respect of the said property;

(ii) (a) Possession of the ground floor of the said premises;

(b) Alternatively, the apportionment of the ground and first floors of the said property in equal area for the possession of the plaintiff and the Defendant; and

(c) In the further alternative an order for sale of the said property, and that the money to arise from such sale to be lodged in court to the credit of this action, subject to further order with such consequential directions as may be necessary, and that provisions be made for the costs of such application.

(iii) one half share (1/2) of mesne profits from 112 February 1989 until possession is delivered up as per prayer 2(a) or 2(b) or until sale of the said property as per prayer 2(c);

(iv) an injunction to restrain the defendant whether by himself or by his servants or agents or otherwise however from entering the plaintiff's portion of the said property;

(v) interest at the rate of 8% pa on the decretal sum from 12 February 1989 to date of realisation;

(vi) further and or any other relief that this honourable court may think fit and just in the circumstances of this case;

(vii) general damages;

(viii) costs of this action.

[3] The defendant contends that the plaintiff holds his part of the said property on an express trust for the defendant and that the plaintiff's claim is wrongful. The defendant further contends that the purchase price of the said property was paid by the defendant, the defendant's late father by the name of Peh Choo Lam and the defendant's late grandmother by the name of Chin Mee Chin. By way of an observation, it is interesting to mention that Seah FJ, when delivering the judgment of the court in *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 made this salutary remark (see p 237):

> … the principle of indefeasibility of title conferred by registration under the Torrens System cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice.

[4] It is not easy to give an exact legal definition of the word 'trust'. In *Wilson v Lord Bury* (1880) 5 QBD 518, at pp 530–531, Justice Story defines it as follows:

> A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que* trust.

[5] But, Underhill in his treatise entitled *Law Relating to Trusts and Trustees* (12th Ed, 1930), criticised such a definition and he advanced the following definition as seen at p 3 in these salient words:

> … an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestui que trust), of whom he may himself be one, and any one of whom may enforce the obligation.

[6] And Romer LJ adopted Underhill's definition in *Green v Russell* [1959] 2 QB 226, p 241. All privately owned property, whether real or personal, legal or equitable, may be held in trust. According to Lord Shaw in *Lord Strathcona SS Co v Dominion Coal Co Ltd* [1926] AC 108, p 124:

> The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land.

[7] It is interesting to note that *Lord Nottingham in Cook v Fountain* (1676) 3 Swantst 585, p 591 made a noble attempt to classify trusts in these erudite words:

> All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant. In the case in question there is no pretence of any proof that there was a trust declared either by word or in writing; so the trust, if there be any, must either be implied by the law, or presumed by the court.

[8] Today, what Lord Nottingham called as a 'presumptive trust' is now known as an 'implied trust'. And what his Lordship described as a 'trust implied by law' is now known as 'constructive trust'. It is my considered view that an express trust is often intentionally created: it may be created by deed or will, or by an unsealed writing inter vivos, or even by word of mouth. Whereas an implied trust arises when the court deduces from the conduct of the parties and from the circumstances of the transaction. These legal niceties are certainly apt and they would be expanded at the trial proper. I keep my options open. I look forward anxiously for the trial proper.

PRODUCTION OF CERTAIN DOCUMENTS FOR EXAMINATION BY THE CHEMISTRY DEPARTMENT

[9] The defendant has filed an application in encl 48 pursuant to O 24 r 11 of the Rules of the High Court 1980 ('RHC') and pursuant to the court's inherent jurisdiction for the plaintiff to produce to the defendant's solicitors the original official receipts of the developer by the name of Lin Seng Rice Mill Company Limited bearing the following serial numbers ('the receipts') for examination by the Chemistry Department, Malaysia:

(a) No 1627;

(b) No 1275;

(c) No 1601;

(d) No 1616;

(e) No 1592;

(f) No 1596;

(g) No 1576;

(h) No 1545;

(i) No 1528;

(j) No 1427;

(k) No 1370;

(l) No 1392;

(m) No 1348;

(n) No 1317;

(o) No 1237; and

(p) No 1242.

[10] By that application in encl 48, the defendant seeks an expert from the Chemistry Department Malaysia to be appointed to examine and analyse the said receipts. The defendant too is asking for costs of the application to be costs in the cause and the defendant too is seeking such further relief and/or other relief as may be deemed fit and just by this honourable court. The grounds to support the application are as follows:

(i) The plaintiff's claim against the defendant in the suit herein is for the vacant possession of one half share of a piece of property ('the said property'), of which both the plaintiff and defendant are the registered joint proprietors;

(ii) It is the defendant's defence that the plaintiff holds his part of the said property on an express trust for the defendant. The plaintiff has produced the said receipts in the action herein, which have a material bearing on the suit;

(iii) The defendant intends to have the said receipts examined by an expert from the Jabatan Kimia Malaysia, as (the) report regarding the said receipts including their authenticity may be of significance to the suit.

[11] The affidavit in support of the application was affirmed by the defendant himself on 19 October 2004 and it is found in encl 33 and at para 5 thereto, the defendant averred as follows:

> The said documents (referring to the receipts) have a material bearing on this suit. The plaintiff intends to have them examined by an expert from the Jabatan Kimia Malaysia as (the) report regarding the documents (referring to the receipts), including their authenticity may be of significance to the suit.

[12] There is a typographical error at para 5 of encl 33 that can easily be detected. It is not the 'plaintiff' who wants the receipts to be examined by the expert from the Chemistry Department, Malaysia. It is the 'defendant' who is interested and it is the defendant's application. Now, the same affidavit in support in encl 33 makes reference to a letter from the defendant's solicitors dated 6 July 2004 addressed to the plaintiff's solicitors and that letter was worded, inter alia, as follows:

5. Further, we refer to the receipts produced in your client's Afidavit Menentusahkan Senarai Dokumen affirmed on 5.3.2004, at pages 3 to 9. Our client enquires whether your client is agreeable to produce the originals of the receipts for examination by the government chemist. If not, our client will consider applying for an order for the same.

[13] What the defendant seeks by that application in encl 48 was to ascertain the 'authenticity' of the receipts. The learned senior assistant registrar dismissed the defendant's application in encl 48 with costs and the defendant now files an appeal to the Judge in chambers in encl 49.

[14] I wonder how is the government chemist going to ascertain the 'authenticity' of the receipts. The defendant's application in encl 48 is vague. The defendant does not know what he wants and what he wants the government chemist to do. The defendant merely avers that he wants the government chemist to be appointed 'to examine and analyse the said receipts'. What is the purpose of examining and analysing the said receipts by the government chemist? At para 4 of the affidavit in support in encl 33, the defendant avers that the plaintiff holds the said property on an express trust for the defendant. Unfortunately, there is documentary evidence to the contrary. Both the parties — referring to the plaintiff and the defendant, are the registered proprietors of the said property and they both held the same in equal shares since 19 September 1968. This is an agreed fact agreed to by both the parties as reflected in encl 32. The principle of indefeasibility comes into play for the benefit of both the parties. The other agreed facts are as follows:

(a) that the said property was charged to Chung Khiaw Bank Ltd for the loan taken; and

(b) that the said property was rented out to a third party from approximately November 1968 to 1978.

[15] In his submission, the defendant submits that he believes that the receipts are 'forged or fabricated'. But there is no evidence to support his belief. It must be borne in mind that the defendant has personally gone through the original documents in the presence of the plaintiff's and the plaintiff's solicitors together with the defendant's previous solicitors when discovery and examination of the receipts was specially given at the defendant's request. It is the plaintiff's case that the purchase price for the said property was paid by the plaintiff's father (the late Peh Choo Lam) and the plaintiff's grandmother (the late Chin Mee Chin) (see paragraph 9 of the Amended Defence to Counterclaim).It must be emphasised that nowhere has the plaintiff pleaded that he has paid the purchase price to purchase the said property. The plaintiff has been forthright. The receipts were never ever suppressed nor were they concealed. In fact, on 30 October 1991 the plaintiff's former solicitors, namely, Messrs Yusof Lee Pathma & Marbeck had written to the defendant's solicitors disclosing the presence of those receipts. The fact of the matter is this. That all the receipts had been disclosed and all the original receipts had been personally examined by the defendant himself. In short, all the original receipts had been produced and inspected by the defendant in compliance with O 24 r 11 of the RHC.

[16] The application in encl 48 is not free from criticism. It is quite apparent that the defendant has failed and/or neglected to state the specific reasons for having the receipts to be examined and analysed in order to rebut any particular averment contained in the amended statement of claim or the amended defence to counterclaim. The receipts that are sought to be examined and analysed are not pleaded at all either in the amended statement of claim or in the amended defence to counterclaim or in the amended statement of defence or in the amended counterclaim. The receipts are not related to any matter in question in this action. The defendant too has also failed and/or neglected to state the relevance of the said receipts in this action. Except that the defendant has asserted baselessly that 'the plaintiff's claim is a false claim and he has falsified some documents in connection therewith' in para 9 of his amended statement of defence, the defendant has failed to substantiate his allegation or state the reasons as to why the receipts are perceived by him to be falsified. An irresistible inference can be drawn that the defendant in filing the application in encl 48 is on a fishing expedition to fish for further evidence. The defendant is on a frolic of his own. It is the stand of the plaintiff that the defendant's application in encl 48 was filed, mala fide, with a view to delay the expeditious disposal of this case. I wholeheartedly agree with the plaintiff's stand.

[17] There is an affidavit in reply affirmed by the defendant on 27 December 2004 as seen in encl 37 and there he avers that the court has the jurisdiction to grant the orders sought for. He too avers to the following set of facts:

(a) that by a letter dated 30 October 1991, the plaintiff's previous solicitors forwarded to the defendant's previous solicitors, photocopies of the receipts claiming that the payments were made by the plaintiff;

(b) subsequently, the plaintiff had filed an affidavit verifying the list of documents affirmed on 31 October 2003 in which the plaintiff did not disclose the existence of the said receipts;

(c) thereafter, the defendant filed a summons in chambers on 19 December 2003 for an order requiring the plaintiff, inter alia, to make and serve on the defendant a supplementary list of documents to disclose the receipts and the defendant obtained the order;

(d) as a result thereof, the plaintiff filed a supplementary affidavit verifying the list of documents which included the said receipts;

(e) that the manner in which the plaintiff first produced the receipts and then appeared to have concealed them for the purpose of discovery raise suspicions about the authenticity of the said receipts;

(f) that the said receipts appear suspect from a comparison of them with the other receipts issued by the developer (Lin Seng Rice Mill Company Limited) to the other purchasers;

(g) consequently, that an examination of the originals of the said receipts by an expert is necessary in order to determine whether or not they are forged; and

(h) that he believes that the said receipts may have been falsified.

[18] Further, in the affidavit in reply in encl 37, the defendant avers that the plaintiff is relying on the said receipts to support the allegation that he had paid the purchase price of the property. According to the defendant, those receipts are of relevance and they pertain to a substantial matter in issue in this case. And if the receipts are fabricated, they will have a bearing upon the validity of the plaintiff's claim and his credibility and veracity thereto. According to the defendant, the plaintiff has in his amended defence to the counterclaim pleaded the substance of the fabrication and anything else is evidence and must not be pleaded. It is the defendant's stand that the necessity for this application is obvious and that the application in encl 48 was filed on a certificate of urgency. The defendant avers that he has by letter dated 6 July 2004 requested the plaintiff to produce the said receipts for examination by the government chemist but to no avail. The defendant avers that if there is nothing to be concealed then there is no need to oppose the defendant's application in encl 48. For these reasons, the defendant craves for an order in terms of his application.

[19] The defendant also affirms another affidavit in reply on 26 January 2005 as seen in encl 39. He proceeds to produce copies of two additional documents issued by the developer (Lin Seng Rice Mill Company Limited) bearing the signature of one Quah Cher Gek who was the managing director of the developer. According to the defendant, these two additional documents will be forwarded to the government chemist for purposes of comparison with the alleged receipts in the plaintiff's possession. The defendant states that the two additional documents are as follows:

(a) a letter by the developer (Lin Seng Rice Mill Company Limited) dated 28 March 1966 to James Yap Mook San; and

(b) a sale and purchase agreement dated 30 March 1966 between the developer (Lin Seng Rice Mill Company Limited) and James Yap Mook San.

[20] The relevance of the defendant's application in encl 48 is nullified by the amended defence to the counterclaim filed by the plaintiff where the plaintiff avers that the purchase price for the said property was paid by the plaintiff's father (the late Peh Choo Lam) and the plaintiff's grandmother (the late Chin Mee Chin). The parties are certainly bound by their pleadings and this case is no exception. According to Brett LJ in *Philipps v Philipps* (1878) 4 QBD 133:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings.

[21] In 1876, in the case of *Lord Hammer v Flight* (1876) 24 WR at p 347, Brett J, aptly said:

> Pleadings now are to be merely concise statements of facts which the party pleading deems material to this case.

[22] Here, the plaintiff has rightly pleaded the facts and not the law (*Middlesex County Council v Nathan* [1937] 2 KB 272; and *Re Vandervell's Trusts (No 2), White v Vandervell Trustees Ltd* [1974] 3 WLR 257; [1974] 3 All ER 205 (CA)).

Only material facts, which would assist in formulating a complete cause of action, should be pleaded. Here, the plaintiff has done just that.

[23] At any rate, it must be borne in mind that all payments shown on the receipts are backed by the bank statements issued by Chung Khiaw Bank Limited. That being the case, how could the defendant say that there was forgery or fabrication perpetrated by the plaintiff?

[24] It is a serious allegation to say that the plaintiff has forged or fabricated the receipts. In law, forgery consists of making a false document in order that it may be used as genuine with the necessary intent to commit fraud or that with the aid of that false document fraud may be committed. To constitute the offence of forgery, the act of making the 'false document' is sufficient. The application of the defendant in encl 48 does not seek a declaration to declare the receipts as 'false documents'. It merely seeks an expert from the Chemistry Department Malaysia to be appointed to examine and analyse the said receipts. And the affidavit in support in encl 33 limits the scope of the application to determining the authenticity of the receipts. It is only in the affidavits in encls 37 and 39 that the allegation of fabricating the receipts surfaced. It is trite law that the person who makes a 'false document' commits forgery. A person who is not the writer of a forged document cannot be charged with committing the substantive offence of forgery. But if the person has caused such a 'false document' to be made he will definitely, if found guilty, be convicted for abetment (*Haidar Ali Pradhania* (1912) 17 CWN 354, 14 Cri LJ 129). It is also trite law that a charge of forgery cannot lie against a person who is not the writer of the forged document or who does not sign the forged document. If the defendant has the evidence that the plaintiff has forged the receipts, he is free to lodge a police report against the plaintiff. Let the prosecution decide whether to charge the plaintiff of the offence of forgery. It is not easy to prosecute anyone for the offence of forgery. The prosecution has to establish that the signatures on the document had been made by the accused himself (*Amar Nath, Convict, Petitioner v State, Respondent* (1971) Cri LJ 1335 (Del)). As Bramwell, B, said in *Reg v John Smith* (1858) 8 Cox 32, p 37 that:

> Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other.

[25] Now, for the signatures on the receipts to be compared by any handwriting expert, the expert must have several contemporary signatures of the person who is supposed to have signed the receipts or several other contemporaneous documents containing the signatures of that particular signatory. And where, may I ask, is the defendant going to obtain the aforesaid signatures for comparison by the handwriting expert? The complaint of the defendant is that some of the signatures appearing on the receipts in the possession of the plaintiff are the same or are similar to the signatures found on some receipts issued to James Yap Mook San. So, where is the forgery or fabrication as highlighted by the defendant? Two pertinent questions must be posed here. Firstly, who is the defendant to decide which of the receipts are authentic? Secondly, how did the defendant come to the conclusion that the receipts issued by the developer (Lin Seng Rice Mill Company Limited) to a third party like

James Yap Mook San are authentic and those issued by the developer (Lin Seng Rice Mill Company Limited) in the names of the plaintiff and the defendant or in the name of the plaintiff alone are not authentic? The defendant submits that to the untrained eye, the signatures in the purported receipts appear similar to the authentic receipts and they also appear to be made by the same person. That would be a submission that borders on making a wild conjecture. As if that is not enough the defendant further submits that it is the defendant's belief that the signatures in the purported receipts are forged. It is well and good to make all these submissions but there is no basis whatsoever to support such a submission. I must emphasise that the defendant is not an expert in the field of handwriting. Mere surmises and conjectures by the defendant are insufficient to bolster up the defendant's submissions.

[26] When one talks of an expert evidence, one is referring to an opinion evidence of an expert. The field of expertise is forever growing. There are many subjects where experts can be called to testify, namely:

(a) road accident investigation, ballistics and battered women's syndrome (*R v Hobson* [1998] 1 Cr App R 31 (CA));

(b) blood tests, breath tests, blood-alcohol levels and back-calculations (*Gumbley v Cunningham* [1989] 1 All ER 5 (HL));

(c) facial mapping (*R v Stockwell* [1993] 97 Cr App R 260 (CA));

(d) facial identification by video superimposition (*R v Clarke* [1995] 2 Cr App R 425 (CA));

(e) fingerprint identification and voice identification (*R v Robb* [1991] 93 Cr App R 161 (CA));

(f) DNA or genetic fingerprint of an individual (*R v Gordon* [1995] 1 Cr App R 290 at pp 293–294 (CA));

(g) dating documents by using an Electrostatic Detection Apparatus ('ESDA') (*R v Wellington* [1991] Crim LR 543 (CA));

(h) handwriting expert (*R v Harden* [1963] 1 QB 8 (CCA));

(i) on a point of foreign law (*Jasiewicz v Jasiewicz* [1962] 1 WLR 1426);

(j) on the issue of obscenity (*R v Anderson* [1972] 1 QB 304, p 313);

(k) a person's mental state (R v Strudwick [1993] 99 Cr App R 326 at p 332 (CA));

(l) psychiatric evidence on the defence of automatism (*R v Smith* [1979] 1 WLR 1445 (CA)); and

(m) to establish that an accused is suffering from a minor hypoglycemic state caused by eating after a 41-day fast (*R v Toner* (1991) 93 Cr App R 382 (CA)).

[27] It is the judge who will determine whether a witness is competent to give an expert evidence (*Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380 (CA)). The expertise of the witness may have been acquired through study, training or experience (*Folkes v Chadd* (1782) 3 Dough KB 157; *R v Oakley* (1979)

70 Cr App R 7 (CA); *R v Murphy* [1980] QB 434 (CA); *Hinds v London Transport Executive* (1979) RTR 103 (CA); and *R v Somers* [1963] 1 WLR 1306 (CA)). In *R v Silverlock* (1874) 2 QB 766, the court held that a solicitor who had studied handwriting for ten years, mostly as an amateur, was allowed to give his opinion as to whether certain disputed handwriting was that of the accused. Experts are entitled to refer the results of a research into a drug found in articles published in medical journals and this was so held in*H v Schering Chemicals Ltd* [1983] 1 All ER 849 at p 853 where Bingham J, said:

> If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper.

[28] The duty of experts, according to Lord President Cooper in *Davie v Edinburgh Magistrates* (1953) SC 34 at p 40, 'is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.' In short, what weight to be attached to the opinion evidence of an expert is a matter entirely for the judge to decide. The opinion of an expert has been the rule and it has been recognised by the court way back in 1554. Saunders J, aptly said in *Buckley v Rice-Thomas* (1554) 1 Plowd 118 at p 124:

> If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences, but our own, but we approve of them and encourage them as things worthy of commendation.

[29] The Evidence Act 1950 contains provisions on opinions of experts. The pertinent sections would be ss 45, 46, 47, 48, 49, 50 and 51. It must not be forgotten that the function of the expert is not to present ready-made conclusions but rather to provide the tribunal of fact with the necessary material on which it can reach its own conclusions. Judges have their own functions and the experts have theirs. The experts must not usurp the functions of the judges. If the experts usurp the functions of the judges, they cease, in law, to assist. While judges are to be furnished with the criteria on which to arrive at their independent judgment, it is clear that their judgment would flow from the conclusions which the experts have themselves reached. That being the case, Judges would inevitably be enquiring as to how the experts have applied the criteria to the facts in order to reach the conclusions.

[30] All these legal technicalities on expert evidence are quite interesting. Unfortunately, they do not apply in adjudicating the defendant's application in encl 48. Enclosure 48 is unhappily worded and this court would not accede to it. There is no basis, at all, for filing encl 48. Consequently, the defendant's appeal in encl 49 must be dismissed with costs. The case management of this case will proceed as scheduled.

Defendant's appeal in encl 49 dismissed with costs.

Reported by Sally Kee